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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 13, Original

STATE OF CALIFORNIA, *Plaintiff,*

vs.

STATE OF WASHINGTON, *Defendant.*

REPLY BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE A COMPLAINT.

PRELIMINARY STATEMENT.

The State of California has not the slightest intention of abandoning any of the arguments set forth in its Brief in Support of Motion to File a Complaint. For brevity, this reply to the Brief of the State of Washington in Opposition to such motion is directed to the issue now joined as to Point I, A of the California Brief (pp. 14-21). Therein California asserted:

> "This case is unique in the history of suits between the states in one respect. This bears directly upon the standing of the State of California to sue.
>
> "Herein the State of California asserts the right to remain free of discriminatory legislation of another state in carrying on, outside of its own boundaries, interstate activities of a commercial nature to promote the sale of a commondity in interstate commerce. It contends that this aspect of its Complaint is itself sufficient to warrant the granting of leave to file it. None of the prior decisions of this Court concerning its original jurisdiction have involved any comparable activity on the part of the complainant state" (Calif. Br. p. 14).

Washington disputes this on the ground that the instant case is controlled by *Oklahoma v. Cook,* 304 U.S. 387 (Wash. Br. pp. 3, 5, 17-23). It is contended that—

> ". . . the state activity in each case as well as the action brought in this court is on behalf of particular individuals which is insufficient basis for invoking the original jurisdiction of this Court." (Wash. Br. pp. 17-18).

Washington contends further that its statutes and regulations do not "legally limit" the wine sales promotion activities of California state agencies (Wash. Br. 3, 5, 13-17).

This Reply Brief will show the fallacy of both arguments in the order stated.

ARGUMENT.

1. OKLAHOMA v. COOK HAS NO APPLICATION HERE: THE PROTECTION OF ITS OWN SALES PROMOTION PROGRAM AGAINST UNCONSTITUTIONAL RESTRICTIONS IS NOT AN ACTION BY CALIFORNIA ON BEHALF OF PARTICULAR INDIVIDUALS.

An action brought "on behalf of particular individuals" is, by definition, a derivative action. It assumes a legal injury to and the accruing of a cause of action in the particular individuals. It further assumes a voluntary assignment or a transfer by operation of law of that right of action from such individuals to the nominal party plaintiff in the action brought to enforce such rights.

Cook squarely fits this pattern of derivative action. The statutes of Oklahoma directed its Bank Commissioner to wind up the affairs of any insolvent bank organized under state law, and to sue its shareholders to enforce their statutory liability for the amount of stock owned. In *Cook,* the Oklahoma Bank Commissioner sought to invoke the original jurisdiction of this Court to obtain a money judgment from a shareholder of an insolvent bank based upon his statutory liability.

The Court very properly found that this recovery was sought by the state "solely for the benefit of the depositors and creditors of the bank", and held that because Oklahoma was not, therefore, asserting a direct interest of its own, it had no standing to sue in the original jurisdiction of the Court. (304 U.S. at 395, 396).

Two aspects of *Cook*, not mentioned in the Washington Brief, compel the conclusion that it has little relevance here and, certainly, does not control the disposition of California's pending motion.

A. In Cook, the State's cause of action was a derivative one; in the instant case, it is not.

In *Cook*, the cause of action sued upon by Oklahoma was derived from a pre-existing cause of action, accrued or inchoate, already possessed by the bank creditors. Oklahoma was nothing more than a trustee for the benefit of these creditors. It follows that, had Oklahoma not embarked upon its program of legally enforcing the shareholders' liability to bank creditors, the creditors legally could have and would have brought their own actions for the same purpose.

In the instant case, California's cause of action arising from the unconstitutional restrictions placed upon its sales promotion program is not derived by it from any person or legal entity. By definition, it arises from the legal injury done to its own program, i.e., to activities of the State itself. If California has no standing to sue for redress of the unconstitutional restrictions placed upon the conduct and operations of its own state agencies, then no plaintiff legally exists who is qualified to bring this action. In a word: there is no alternative plaintiff. Certainly, the producers of California wine have no litigable interest in the State's program and the official acts of the State's employees in furtherance thereof. This case is, therefore, the *converse* of *Cook*, not its parallel, as Washington contends.

It may well be that California wine producers, also, have been injured by operation of Washington laws, in the conduct of their respective businesses, and have thereby become vested with their own causes of action against Washington. Those causes, however, are wholly independent of the cause under discussion here.

B. In Cook, the State's program suffered no restriction or legal injury; in this case, it did and does.

In the course of pursuing its program of bank liquidation and enforcement of shareholders' liabilities, Oklahoma suffered no loss or invasion of any right conferred upon it by the Constitution of the United States. No person, no other state restricted or prevented Oklahoma from carrying out its program--certainly not in any manner which gave rise to an independent cause of action for relief and redress from any such restriction or prevention.

In sharp contrast, the right of California to sue now under discussion (Calif. Br. I, A, pp. 14-21) arises from the discriminatory and unwarranted interference by Washington with the execution of its program.

Summing up, in *Cook,* the cause sued upon did not arise from injury or interference with the State's program; instead, it was derived by the State from the bank creditors. The very *raison d'etre* of Oklahoma's program was to enforce, by state action, shareholders' liabilities as an incident of bank liquidation. Here the purpose and scope of the California pro-

gram is the interstate promotion, by activities of a commercial nature carried on by the State, of the sale of California wine. The cause here discussed is not a part or element of, or in furtherance of that program. On the contrary, it is to protect the program from unwarranted restrictions and interference being inflicted upon it by the official acts of another state. To assert and obtain this protection there is no possible plaintiff other than the State of California.

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2. OKLAHOMA v. COOK HAS NO APPLICATION HERE: CALIFORNIA'S PROGRAM OF WINE SALES PROMOTION IS NOT ACTIVITY ON BEHALF OF PARTICULAR INDIVIDUALS.

In an effort to minimize the fact that it is the sales promotion program and activities of the State itself which are frustrated and restricted by official acts of Washington, the Washington Brief (pp. 17-19) argues that these activities are conducted by California "on behalf of private persons" and that "the statutory scheme is to make the Director of Agriculture an agent for producers and handlers of various agricultural products." In support of this, Washington calls attention to the referendum provisions of the California Marketing Act (§ 1300.16 (a)(1) and (2)), which require that any marketing order issued by the Director be approved by a prescribed number of producers before becoming effective.

In *Parker v. Brown*, 317 U. S. 341, this Court considered the effect of such a referendum requirement under a comparable statute, the California Pro-

rate Act. Holding that the program and activities were those of the state, regardless of the referendum requirement, the Court said:

> "It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . . The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace,* 306 U. S. 1, 16; *Hampton & Co. v. United States,* 276 U. S. 394, 407; *Wickard v. Fulburn,* 317 U. S. 111." (317 U. S. at 352.)

Substituting the Director of Agriculture for the references to the Prorate Commission, this statement is fully applicable to the instant case.

The remaining references in the Washington Brief on this point contain inaccuracies that warrant correction.

Section 1300.16(c) does *not* provide "for termination of any marketing order by a request in writing" by a prescribed number of producers (Wash. Br. p. 18). Instead, the power of termination, like the power of issuance and enforcement, is vested exclusively in the Director of Agriculture. The section provides that if termination is requested by the requisite number of producers—

> ". . . the director shall, if he finds such marketing order is contrary to or does not tend to carry out the declared policy of this chapter, terminate such marketing order; . . ." (Calif. Agric. Code § 1300.16(c)).

As to the Wine Advisory Board (Wash. Br. pp. 18-20), it need only be noted that assessments levied by the Director of Agriculture and other moneys becoming due under the Wine Marketing Order are paid, not to the Wine Advisory Board, but to the Department of Agriculture. In turn, the Department makes all of the necessary disbursements and keeps the financial records of operations under the wine sales promotion program and other activities of the State conducted under the Wine Marketing Order.

Instead of the statutory scheme making the Director of Agriculture an "agent for producers and handlers" of wine (Wash. Br. p. 19), actually the industry members serving on the Wine Advisory Board are the agents and advisors of the Director. The Board collects no money, it has no money, it spends no money. It has no rule-making power, nor the power to make financial or other policy decisions; it can only make recommendations to the Director for his decision. It takes no action, except to assist the Director and, subject to his approval, to administer the programs and activities previously authorized by him. The duties of the Board, "shall be administrative only" (§ 1300.15(a)(2)).

In a word, the sales promotion activities involved in the Complaint are those of the State itself, over

which members of the California wine industry have no control. That the State's activities subserve a statewide public interest can readily be demonstrated. It was so declared in the legislative declarations of the economic conditions which gave rise to the California Marketing Act and of the purposes to be served thereby (§ 1300.10, 1300.11; Comp. App. D, pp. xv, xvi).

Moreover, this Court has acknowledged the legitimacy of a statewide interest in the national marketing of its agricultural products. In *Sligh v. Kirkwood,* 237 U. S. 52, the Court upheld a Florida statute prohibiting the interstate marketing of immature Florida citrus fruits, and said:

> "We may take judicial notice of the fact that the raising of citrus is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market . . . The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relationship to the accomplishment of that purpose." (237 U. S. at 61-62).

If it is competent for a state to *protect* the reputation of its products in foreign markets, it is equally competent for a state to seek to *enhance* that reputation by interstate sales promotion activities of the type here involved.

3. THE EFFECT IN OPERATION OF WASHINGTON LAWS IS TO RESTRICT THE WINE SALES PROMOTION ACTIVITIES OF THE STATE OF CALIFORNIA. IT IS SPECIOUS TO CONTEND OTHERWISE, OR THAT SUCH AN EFFECT IS NOT ALLEGED IN THE COMPLAINT.

The Washington Brief (p. 3) states that in paragraphs 38(a) and 39-46 of its Complaint, "California implies, but does not allege, that the Washington statutes and regulations . . . operate directly to restrict or prohibit" sales promotion activities of California state agencies.

Contrary to this assertion, the Complaint makes such an allegation not once, but thrice. It alleges that California is "effectively precluded from" (Comp. par. 46), "denied the opportunity to" (Comp. par. 2(c)), "can [not]" (Comp. par. 36(d)) promote the sale of California wine in Washington because of the discriminations complained of which are shown in paragraphs 18-37 to arise directly from official acts of Washington. The Complaint is, of course, to be construed as a whole. Any doubt as to the intendment of the allegations of par. 2(c), 36(d) and 46 should have been eliminated by reference to the California Brief (p. 13).

Washington further asserts that its laws do not "restrict or prohibit" California's sale promotion activities. To the extent Washington contends that California's activities are not *prohibited* in terms by Washington law, it is arguing an issue not raised by either California allegation or argument. To the extent it contends that such activities are not *restricted* as a result of the practical operation of Washington

laws, it contravenes the allegations of the Complaint (pars. 2(c), 36(d), 46).

It is self-evident that the most effective control over business activities a state can devise is control over the existence of the economic institutions by means of which business is conducted. There is no need for concern over usurious interest rates, for example, if the business of lending money is forbidden.

In terms of economic reality, the sale of California wine cannot be promoted in Washington at the wholesale level for the simple reason that there are no wholesalers of California wine, either public or private. In its state liquor stores Washington conducts what can only be characterized as a strictly retail business (Comp. pars. 14-16, 20-24). On the other hand, there are 135 private wholesalers engaged in the promotion as well as the sale and distribution of Washington wine (Comp. pars. 9, 11).

At the retail level, California is equally blocked from effective promotion of the sale of California wine by operation of discriminatory Washington laws. The Complaint alleges that by reason of the discriminatory pricing and sales policies of the Washington State Liquor Control Board with respect to California wine (Comp. pars. 20-31) "the State of Washington has destroyed the economic incentive of its retail licenses to deal in California wine" (Comp. par. 36(c)). It is futile to attempt the promotion of sales by retail licensees who are forced to compete with their one source of supply for the trade of consumers

and to pay the same retail price per bottle as any consumer. Further, it is no more practicable for California to engage in sales promotion work at the retail level, because of the number of retail licensees (see Comp. par. 46), than it would be for producers of Washington wine. Granted the privilege of a free choice in the matter, Washington wine producers utilize the services of the private wholesalers to promote sales at the retail level, rather than deal directly with the 4,800 retail licensees scattered throughout Washington. The only wine dealer in Washington which might have an economic incentive to promote the sale of California wine, the State Liquor Control Board, is prevented by law from doing so (R.C.W. 66.08.060; Comp. App. A, p. ii).

Washington concedes that, for purposes of the instant motion, the allegations of the Complaint must be taken as true (Wash. Br. p. 2). Under the circumstances alleged, which, as alleged, arise directly from the operation of discrimintory Washington statutes and regulations, it is naive to contend that California is "in fact free to conduct promotional activities", and it contravenes the Complaint to add that California has "fully exercised its privilege to do so" (Wash. Br. p. 15).

4. THE TWENTY-FIRST AMENDMENT LITERALLY HAS NO APPLICATION TO THIS CASE.

Section 2 of the Twenty-first Amendment reads:

> "*The transportation or importation into* any State, Territory, or possession of the United States for delivery or use therein *of intoxicating liquors,* in violation of the laws thereof, *is hereby prohibited.*" (Emphasis added).

The very words of the Amendment indicate that its effect is limited to *the transportation or importation into* a state in violation of its laws. In this case California does not complain of Washington laws which govern and control the "transportation or importation into" Washington of California wine. The official acts of Washington complained of herein deal exclusively with the discriminatory treatment accorded to California wine after it has been legally imported into Washington (See Comp. par. 2). It is thus apparent that the Twenty-first Amendment can have no effect upon, and hence cannot justify, the discriminations complained of—neither the discriminatory restrictions upon California's own interstate sales promotion program, nor the discriminatory burdens placed upon the interstate commerce in California wine after it has been lawfully transported into Washington for marketing to ultimate consumers.

None of the cases relied upon by Washington in discussing the Commerce Clause in the light of the Twenty-first Amendment (Wash. Br. pp. 50-55)—in fact, no prior decision of this Court—has any bearing here. Thus, *State Board of Equalization* v.

Young's Market, 299 U.S. 59, involved the licensing of acts of importation; *Mahoney v. Joseph Triner Corp.,* 304 U.S. 401, involved a statute which required that liquor transported into the state have its brand name registered in the United States Patent Office, i.e., a condition of importation; *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, and *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395, involved statutes which prohibited the importation of beer from other states which had themselves place certain restrictions upon the importation of beer.

The most recent pronouncements of the Court on the subject of the Twenty-first Amendment support the contention here made; that is, that the Twenty-first Amendment applies literally only to "the transportation or importation into" a state "for delivery or use therein." In *Duckworth v. Arkansas,* 314 U.S. 390, and again in *Carter v. Virginia,* 321 U.S. 131, the Court declined to interpret the Amendment as including within its scope state police regulations dealing with the *through transportation* of alcoholic beverages.

Washington's Brief does not even discuss the fundamental contention of California: that the discriminations arising from the official acts of Washington complained of violate the Commerce Clause (Calif. Br. pp. 45-46). Against this charge, Washington's sole reliance is upon the Twenty-first Amendment. It assumes, without argument, that this case involves the prohibition or regulation of the act of transporting or importing liquor into the State of Washington

and, hence, is within the reach of the Twenty-first Amendment. This basic assumption is without warrant. It ignores the allegations of the Complaint, taken as a whole, and the demonstration in the California Brief (pp. 38-39) that this case involves, not regulation of importations, but—

> ". . . discriminations practiced by the State of Washington against California wine *lawfully admitted* into Washington, in favor of Washington wine." (Calif. Br. p. 39, emphasis added).

CONCLUSION.

For all of the foregoing reasons, as well as those previously urged in the California Brief, the Motion for Leave to File a Complaint of the State of California should be granted.

Dated, May 5, 1958.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

The undersigned, being first duly sworn, deposes and says:

That on the 5th day of May, 1958, he served the within and foregoing "Reply Brief of the State of California in Support of its Motion for Leave to File a Complaint" upon the State of Washington, the defendant, as prescribed by Rules 9 and 33 (par. 3(b)) of said Court.

He deposited at the post office at San Francisco, two copies of the said Reply Brief, securely enclosed in an envelope, air mail postage prepaid, addressed to each of the following officials of said defendant State at his post office address, as shown below:

Honorable Albert D. Rosellini,
Governor of the State of Washington,
State Capitol,
Olympia. Washington.

Honorable John J. O'Connell,
Attorney General of the State of Washington,
Temple of Justice,
Olympia, Washington.

WALLACE HOWLAND,
Assistant Attorney General of the State of California.

Sworn to before me this 5th day of May, 1958.

(Seal)

IRENE FALVEY,
Notary Public in and for the City and County of San Francisco, State of California.